process here unsupported by precedent.[9] Nor can it now be doubted that the Federal Constitution enables Congress to create corporations where reasonably necessary to the proper exercise of its other powers.[10] The requisite consent on the part of the members to incorporation is furnished by their continuance in the association.[11]

Voluntary associations are to-day an enormous factor in commercial enterprise, while in general the law is still clinging to clumsy, antiquated methods of laying hold of them. Equity, it is true, has appreciated the difficulty of corralling all the members of a large association even with the aid of statutes permitting substituted and constructive service of process, and has accordingly invented the device of a so-called representative suit,[12] in which a few members only are made parties and a decree rendered binding all; but this practice has never been taken over by the law courts. The result achieved in the principal case seems to the writer not only unobjectionable in point of principle, but a particularly timely contribution to the law.

CIVIL CONSCRIPTION IN THE UNITED STATES. — That the state may, in case of necessity, compel its citizens to do military service, is consonant with our ideas both of common and of constitutional law. That the satisfaction of any civil need of the state may likewise be compelled, however, is a conception new to us, and one that will be regarded by most lawyers with instinctive hostility. But this compulsion, which, in lieu of a better term, may be called civil conscription, is, it is submitted, settled in practice and sound in principle. The service, both military and civil,[1] which the feudal system exacted, had a larger warrant than any theory of land tenure could give,[2] in the inherent right of the state to safety and to preservation.[3] The real basis of the conscription is the

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[9] Buckland *v.* Fowcher, 2 H. 7, 13 *a*, *b*, where R.'s mere license from the king to grant rent in succession to a chaplain was held to confer a corporate capacity on the chaplain and his successors. This case is cited and discussed in 10 Co. 27 *a* and KYD, CORPORATIONS, 52, 62. See also Taff Vale Ry. Co. *v.* Amalgamated Society of Railway Servants, [1901] A. C. 426; discussed in 15 HARV. L. REV. 310.

[10] See MORAWETZ, CORPORATIONS, 11.

[11] Assent to incorporation need not be express but may be inferred from acts. See MORAWETZ, CORPORATIONS, 23.

[12] For a more detailed analysis, see STORY, EQUITY PLEADING, § 94 *et seq.*; cases collected in 1 B. R. C. 854.

[1] For the heavy civil duties attached to villein tenure, see POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 370, 372.

[2] Military service was exacted even of those who held no land. MAITLAND, CONSTITUTIONAL HISTORY OF ENGLAND, 162.

[3] This right has been consistently recognized both in England and in the United States. See Rex *v.* Larwood, 1 Salk. 167, 168: "The King hath an interest in every subject, and a right to his services." *Cf.* Lanahan *v.* Birge, 30 Conn. 438, 443: "It is a fundamental principle of national law, essential to national life, that every citizen . . . is under obligation to serve and defend the constituted authorities of the state and nation . . . when such service is lawfully required."

In 1642 Parliament and King Charles disputed concerning the King's right to conscript without Parliament's consent. See A DECLARATION OF THE LORDS AND COMMONS ASSEMBLED IN PARLIAMENT UPON THE STATUTE OF 5 H. 4, WHEREBY THE COMMISSION OF ARRAY IS SUPPOSED TO BE WARRANTED: TOGETHER WITH DIVERS OTHER STATUTES . . . AS ALSO HIS MAJESTIES LETTER TO THE SHERIF OF LEICESTERSHIRE

necessity of the state, and accordingly the considerations of liberty of the individual, and of equality of treatment, must be wholly subordinated to that. Thus, even a capricious and sometimes deliberately unequal conscription has been lawfully practiced in England for centuries, in impressment for the navy.[4] That the state may need civil service equally as much as military is obvious. Both kinds of service are essentially alike, for both sacrifice the individual to the nation's welfare with the same clear purpose. And not only are military conscription and civil conscription identical in nature, but also the difference in form between them may be imperceptible.[5] The common law is, then, that any service whatever, whether military or civil, which the state requires, it may exact of its citizens.[6]

It is, however, true that comparatively few instances of civil conscription are recorded in the books.[7] The classic example is the holding of public office. The resignation of any public officer is effective only at the will of the sovereign.[8] And one duly elected to office may be compelled to accept the place and to perform its duties.[9] A recent California case [10] suggests the possibility of a still further infringement on the liberty of the individual, raising the problem, whether the state may compel a man to run for office after he has been nominated,[11] and the even more import-

TO EXECUTE THE SAID COMMISSION ACCORDING TO HIS MAJESTIES PROCLAMATION. This contains a full inquiry into the early military conscriptions. Said King Charles (p. 20): "And considering that in ancient time the *Militia* of the Kingdom was ever disposed of by Commissions of Array . . . Wee have thought fit to referr it to that ancient legall way . . . authorizing you to Array and traine our People, and to apportion and assesse such persons as have estates and are not able to beare Armes, to find Armes for other men . . . and to conduct them so Arraid. . . ." To which Parliament replied (p. 9) that the Petition of Right forbade the King to impose any "tax or charge" upon the people without Parliament's consent.

[4] 2 MAY, CONSTITUTIONAL HISTORY OF ENGLAND, 137–40. *Cf.* with the necessity for compensation, note 24, *infra*. For the formation of contracts of labor by persons without means of support, which English statutes compelled as late as 1875, see FREUND, THE POLICE POWER, § 448.

[5] Is the "home service" conscription now being instituted by Germany, military or civil in form? And how are we to class the conscription provided for by the British "man-power" bill, at the present moment under debate by Parliament? *Cf.* the operation of the railways of France by the railway employees in their capacity of conscripts, which was threatened by the French government in 1910, to avert a strike. JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE, 8395 (12 Octobre, 1910); ROUCHY, LES GRÈVES DANS LES CHEMINS DE FER, 61; see 96 OUTLOOK 474 (October 29, 1910).

[6] See the great opinion of Shope, J., in People *ex rel.* German Ins. Co. *v.* Williams, 145 Ill. 573, 582, 583, 33 N. E. 849, 852, approved in 7 HARV. L. REV. 186. *Cf.* 1 BLACKSTONE, COMMENTARIES (Sharswood), * 138, to the effect that the sovereign may require of the subject anything that does not necessitate the subject's exile from the realm.

[7] See FREUND, THE POLICE POWER, § 613.

[8] Edwards *v.* United States, 103 U. S. 471. This common law principle prevails in the United States despite the fact that here "public offices are sought rather than shunned." A recent English *dictum* stands alone in questioning the application of this principle to statutory offices. See Bray, J., in Rex *v.* Sunderland Corporation, [1911] 2 K. B. 458, 464.

[9] People *ex rel.* German Ins. Co. *v.* Williams, *supra*. Not only will *mandamus* lie against the person elected, to compel the performance of the duties of the office, but also his failure to accept the office constitutes an indictable offense.

[10] Bordwell *v.* Williams, 52 Cal. Dec. 267, 159 Pac. 869, discussed in 5 CAL. L. REV. 77.

[11] The candidate cannot withdraw after nomination, under most primary statutes. *Cf.* State *ex rel.* Donnelley *v.* Hamilton, 33 Nev. 418, 111 Pac. 1026, with Elswick *v.*

ant question, whether it may compel him to seek the nomination in the party primaries which statutes have now generally established.[12] It is submitted that in both of these cases such compulsion may be lawful, since there well may be a public interest sufficient to warrant it.[13] The Conscript Fathers may be conscript in fact. Another continuing public duty whose compulsory performance has been urged [14] is the exercise of the suffrage. The only attempt that has yet been made in any common law jurisdiction to establish compulsory voting has been held unconstitutional as a compulsion of an act of sovereignty.[15] Compulsory jury service has existed almost as long as juries have.[16] So, too, witnesses have been compelled to appear; [17] and labor upon public roads has been conscripted,[18] from the beginnings of the common law until the present

Ratliff, 166 Ky. 149, 179 S. W. 11. It is submitted that such statutory prohibitions are merely expressive of the state's need, and not enlargements of the common law.

It should be noticed that withdrawal, like resignation from office, may be considered to involve another element than state conscription, in the individual's prior consent to hold the office or to have his name upon the ballot. That, however, is not the real ground of these decisions.

[12] There are apparently no cases as yet which squarely decide this point. For the candidate's power to withdraw after his name has gone on the primary ballot, under statutes with similar and rather technical provisions, see Bordwell *v.* Williams, *supra*, and State *ex rel.* Thatcher *v.* Brodigan, 37 Nev. 458, 142 Pac. 520.

[13] The public interest which may warrant the conscription of candidates is the identical interest which has established the direct primary. The primary statutes make the nominee even in form a public officer, and the nomination a public office. Johnston *v.* Board of Elections of Wake County, 90 S. E. 143 (N. C.). See also 26 HARV. L. REV. 351. It would seem that candidacy, even before it has ripened into nomination, also might be a public office.

[14] Former Attorney-General Wickersham, in his address before the Chester County Historical Society, September 28, 1912, on "The Individual and the Community." See also Mr. Wickersham's letter in THE SUN, New York, October 6, 1912. It would appear that compulsory voting is quite generally established in civil law countries.

[15] Kansas City *v.* Whipple, 136 Mo. 475, 38 S. W. 295. In this unique case a provision in the charter of Kansas City which made failure to vote a penal offense, in effect, was held unconstitutional as an attempt to force the sovereign's act, since the electorate in voting act in the capacity of the sovereign. The court admitted that there was a duty to vote, but denied that performance of the duty could be compelled. Said Brace, C. J.: "It is not service at all, but an act of sovereignty."

It is submitted that the choosing, and not the expressing of the choice (which was all the charter compelled) is the act of sovereignty; but conceding that voting is an act of sovereignty, the error in the court's reasoning is its failure to perceive that it is the sovereign who is forcing the performance of this sovereign act by the electorate. It is (to carry out the court's fictitious conception) as though the sovereign compelled his arm to write, or his judges to make the round of assizes.

For a sharp and undeserved criticism of this case, see 10 HARV. L. REV. 439.

[16] See Kansas City *v.* Whipple, *supra*. It is difficult to see that jury service is less a sovereign act than voting is.

[17] Israel *v.* State, 8 Ind. 467. Of all these cases of conscription it should be observed that they are not isolated compulsions, but merely examples of the state's exercise of its general conscriptive power. So, here, the compulsion is said to be warranted by "the general interest and public concern."

The Sixth Amendment to the Constitution of the United States provides that in certain cases the defendant shall be entitled to compulsory process to secure the appearance of witnesses in his favor.

[18] See Dennis *v.* Simon, 51 Ohio St. 233, 36 N. E. 832; *In re* Dassler, 35 Kan. 678, 12 Pac. 130. Here also statutes authorizing the compulsion are not enlargements of the common law, but merely declarations of the state's need. See Butler *v.* Perry, 240 U. S. 328.

For the constitutionality of these road-building statutes, see *infra*.

time. Wherever there is need the state may, at common law, conscript citizens to form a posse, to assist in making arrests, to report cases of contagious disease, to extinguish conflagrations,[19] and even to serve in a permanent fire department.[20] Attorneys may be compelled to defend poor persons in courts of law.[21] It is clear that in any emergency, whether one that has arisen in the past or not, citizens may be conscripted to avert danger to the state.[22] Compulsory arbitration, involving conscription for a limited period, may likewise be instituted, as has been done by recent legislation in this country.[23] Nor is there any need for compensation, at common law, for any service thus compelled by the state.[24]

There are, indeed, no limitations upon the state's conscripting power at common law other than the state's need for, or, more accurately, benefit from the conscription. The benefit must, of course, be so great as to outweigh the detriment to the state that interference with the individual will necessarily cause. In determining the benefit that will flow from the conscription, and hence its legality, the possibility of a species of *sabotage* should be considered seriously. The man compelled to serve may work positive injury to the state while ostensibly he is serving it; or (and this is a more likely contingency) he may either neglect entirely or perform inefficiently the duties which have thus been thrust upon him. It may be urged that, although the state may conscript for what is historically a governmental purpose, it cannot do so for purposes of a (historically) non-governmental business in which the state may have engaged. Such a distinction, however, would be fundamentally unsound, for if the public interest warrants the carrying on of the business by the state, it may also warrant the state's conscription to support it.[25]

The limitations on civil conscription which are peculiar to the United States are likewise few.[26] The Sixth Amendment to the Constitution of

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[19] For these four emergency services, see FREUND, THE POLICE POWER, § 614.

[20] See Kansas City *v.* Whipple, *supra*.

[21] FREUND, THE POLICE POWER, § 613.

[22] For example, work upon a Mississippi levee could certainly be compelled. At the time of the great coal strike of 1902–03, it was ably argued that the state (having taken over the coal mines) could conscript men to run them. T. A. Sherwood, "Power of the State to Operate Coal Mines and Conscript Men for that Purpose when Necessary to Avert a Public Calamity," 57 CENT. L. J. 25, 28. Mr. Sherwood rightly bases the power to conscript upon the state's "inherent power to prevent its own destruction."

[23] Colorado has forbidden employees in "any industry affected with a public interest" to strike "prior to or during an investigation, hearing, or arbitration" of the dispute by the State's arbitration commission. 1915 SESSION LAWS OF COLORADO, 578. *Cf.* the strong recommendations of compulsory arbitration of railway disputes in the President's Message to Congress, December 5, 1916. So, also, employees may be restrained from quitting labor at a time when injury to the state will ensue. 2 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES, § 459. In many states statutes provide that railway employees shall not quit work, on a strike, elsewhere than at a place of destination. FREUND, THE POLICE POWER, § 333.

[24] "Since in all these cases the duty is general, no compensation is due." FREUND, THE POLICE POWER, § 614. See also § 613. For cases where the rights of private property must yield to the general interest, without compensation, see 2 KENT, COMMENTARIES ON AMERICAN LAW, 12 ed. (Holmes), * 339.

[25] *Cf.* the conscription to run the railways of France, both state-owned and privately-owned, in note 5, *supra*. It is but a short time since this country was confronted with a similar situation, which was, however, met in a different way. See 30 HARV. L. REV. 63.

[26] Perhaps here it should be observed that the institution of a system of probation in

the United States expressly provides for compulsory witness service in certain cases.[27] Conscription to serve the state's needs is neither slavery nor involuntary servitude, within the meaning of the Thirteenth Amendment.[28] And although a citizen's right to dispose of his own labor as he desires has been construed to be included both in "liberty" [29] and in "property," [30] as used in the Fourteenth Amendment, yet conscription by the state has never been regarded as a deprivation [31] of either liberty or property (since it is a general burden, and inures to the general welfare). A more intricate question than these is raised by the possibility of conscription by a State[32] for a purpose not in harmony with the interests of the United States. The most incisive example of such a State conscription is the military conscription instituted by Alabama, Mississippi, and other States[33] in the course of the Civil War.[34] Such a conscription is, of course, unconstitutional. The converse of this situation is presented when the United States conscripts to the injury of a State. In such a case, if the conscription is for the national welfare (as it would have to be to be otherwise lawful), it should be lawful notwithstanding the injury to the State.[35] Even in the United States, the certain limit to

criminal proceedings may permit, and in some cases already has permitted, trial courts to enforce conscription, both military and civil. The constitutionality of such judge-imposed compulsions has not yet been attacked, although the policy of the military conscriptions has been vehemently assailed. See frequent comment in the issues of the ARMY AND NAVY JOURNAL, 1915 and 1916. It should be noticed that although the probation may be both cruel and unusual (*cf.* BOSTON EVENING TRANSCRIPT, November 24, 1916, for a court order to hear Billy Sunday preach), it is not a punishment, but merely the condition of withholding punishment. Conscription through a probation order thus differs from other conscriptions in that it is made effective through an independent threat.

[27] See note 17, *supra*.

[28] Butler *v.* Perry, *supra*. In this case a Florida statute requiring labor for two days in each year upon the public roads was held constitutional. The court said (p. 333) that the Thirteenth Amendment "introduced no novel doctrine with respect of services always treated as exceptional, and certainly was not intended to interdict enforcement of those duties which individuals owe to the state, such as services in the army, militia, or on the jury, etc. The great purpose in view was liberty under the protection of effective government, not the destruction of the latter by depriving it of its essential powers." See also Robertson *v.* Baldwin, 165 U. S. 275, especially the dissenting opinion of Harlan, J., at p. 298.

Cf. Dennis *v.* Simon, *supra*, where conscription to build the public roads was held not to be such involuntary servitude as the State bill of rights prohibited.

[29] Allgeyer *v.* Louisiana, 165 U. S. 578.

[30] Adair *v.* United States, 208 U. S. 161, 172. See Coppage *v.* Kansas, 236 U. S. 1, 14; 2 WILLOUGHBY, CONSTITUTIONAL LAW OF THE UNITED STATES, § 474.

[31] Butler *v.* Perry, *supra*, at p. 333; FREUND, THE POLICE POWER, § 614.

[32] A State is certainly enough of a sovereign to conscript, for a proper purpose. See Lanahan *v.* Birge, note 3, *supra*.

[33] Although no position was consistently taken by the Supreme Court of the United States, the view whose soundness force has warranted is that the States of the South, having no power to secede, were at all times members of the United States. Texas *v.* White, 7 Wall. (U. S.) 700; Keith *v.* Clark, 97 U. S. 454.

[34] See 1 DAVIS, THE RISE AND FALL OF THE CONFEDERATE GOVERNMENT, c. xiv, p. 510.

[35] Thus, the State courts under the Confederacy held repeatedly that the conscription of the Confederacy prevailed over even a prior conscription of the same citizen by his State. State *ex rel.* Graham, *In re* Emerson, 39 Ala. 437; *Ex parte* Bolling, *In re* Watts, 39 Ala. 609; Simmons *v.* Miller, 40 Miss. 19. In Simmons *v.* Miller (at p. 24) the Confederate Constitution is construed in terms of the Constitution of the United States, which it closely followed.

the individual's liberty is the state's necessity. And "necessity" may be in the future, as it has been in the past, translated into terms of policy.

MUNICIPAL LIABILITY FOR TORT. — In attempting to state the principles upon which the tort liability of municipal corporations is to-day based it is difficult to discover any formula adequate to explain the cases. The rule generally professed by the decisions denies liability for the performance of a governmental function, and allows recovery where the function is municipal, *i. e.*, non-governmental. This distinction is doubtless based upon an analogy to the non-liability of the state for torts.[1] It was natural enough to hold a city exempt when performing functions which in its small sphere corresponded to those handled by the state. But the municipality being a smaller and more adaptable unit has outstripped the state in entering into the economic life of the people. In taking up enterprises formerly conducted by private business the analogy of governmental immunity has been inapplicable, and here the liability of a private person has been imposed. Non-liability for governmental acts has in the main achieved just results because the considerations of policy underlying the immunity of the state have also been present in many of the so-called governmental functions of the city. One weakness, however, has been the failure to realize that the rule, being based upon an analogy, is properly to be used only where the situation is fundamentally similar. The application of the rule has often been too broad and undiscriminating.[2] The chief defect, however, is that the test is not self-defining, and is therefore no true test at all. The state aims to secure to its people a certain minimum of well-being. The extent of this minimum varies with time, place, and circumstance; it is relative and continually changing. To speak of a governmental function, therefore, means little in itself. The test, moreover, purports to be a permanent one; but being in fact ever changing it is ill adapted to the end of setting precedents. Thus if states extend their activities as far as have the cities into the domain of business — as seems very likely to happen under the present tendency — the conception of governmental, if properly applied, would cover all activities of the city. Otherwise it would become a mere historical commentary.

A more specific examination of the present state of the law is now necessary. Classed as governmental are the police,[3] school,[4] health,[5] charities,[6]

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[1] See GOODNOW, MUNICIPAL HOME RULE, 180.

[2] For examples of excessive applications of this sort of an exemption, as, for instance, to common carriers transporting mail, see John M. Maguire, "State Liability for Tort," 30 HARV. L. REV. 20, 27. So independent contractors constructing county roads have been exempted. 29 HARV. L. REV. 323.

[3] See 4 DILLON, MUNICIPAL CORPORATIONS, 5 ed., § 1656.

[4] Hill *v.* City of Boston, 122 Mass. 344; 4 DILLON, § 1658.

[5] Valentine *v.* City of Englewood, 76 N. J. L. 509, 71 Atl. 344; Mitchell *v.* City of Rockland, 52 Me. 118; 4 DILLON, § 1661.

[6] Maximilian *v.* Mayor, etc. of New York, 62 N. Y. 160. Here, as in many other cases of exemption, the decision states that the particular tortfeasor, though appointed, paid, controlled, etc., by the city, is the agent not of the city but of the public. This seems to be only a method of making the result of non-liability appear more conclusive.